Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. 01-_____

In The
Supreme Court of the United States

Page Penk,

Petitioner,

v.

The Honorable William Jefferson Clinton

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGEMENT

Page Penk
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QUESTIONS PRESENTED

I. Does the use of an advanced camera, whose imaging capabilities, according to Forbes Magazine, Nov. 29th, 1999, pg. 144, give government agents the ability to view inside homes in a way "akin to what you see if you were to peel back the door of a container being surveyed.", allow the president to authorize military searches of private property absent a search warrant?

II. Does the use by the government of this advanced imaging technology, one that sends an energy pulse into a home before returning a picture, cross the line into Fourth Amendment violations when used without a search warrant, exigent circumstances or probable cause, as this Court recently grappled with during oral arguments in *Kyllo v. U.S.* (99-8508)?

III. Is the president immune from civil suit in authorizing military searches using this Superman camera because he "has absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility" under *Nixon v Fitzgerald*, 457 U.S. 731, 766 (1982) as the district court judge ruled?

IV. If this Court affirms a president is immune from civil suit in the use of this particular camera, can future presidents use other technologies for peeping into our homes without the approval of a judge and be protected from suit as well?

QUESTIONS PRESENTED - Continued

In 1997, a military jet left a routine training flight along the Mexican-Arizona border and flew all the way to Colorado where the pilot committed suicide by flying into the side of a mountain. Because the military thought the plane was stolen, they used a remarkable camera called Advanced Synthetic Aperture Radar to look for it.

Developed at Sandia National Laboratory in New Mexico and according to the Lab's web site at http://www.sandia.gov/RADAR/sarapps.html (scroll to - Foliage and Ground Penetration) "Synthetic aperture radars offer the capability for penetrating materials which are optically opaque, and thus not visible by optical or IR [infrared] techniques." This Superman camera can "see" right through what appears to be solid and take a picture of what's on the other side. In the hunt for the lost jet, the Air Force used this device to search inside any and all private buildings where they thought the plane might be. They openly mention using this camera five separate times in the Denver Post.

Despite these searches going on for weeks, the military failed to apply for or get a single search warrant to use that camera to photograph the inside of those buildings. One of those structures illegally searched may have been mine. Finding out if that's true is the point of this action. And because the respondent authorized his subordinates in the armed forces to carry our those searches, that makes him liable for my civil rights violations because he was the sole legal head of the military and the only person legally responsible for everything they did.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i

TABLE OF AUTHORITIES.....v

OPINIONS BELOW.....1

JURISDICTION.....1

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED.....1

UNITED STATES CODE INVOLVED.....1,2

STATEMENT OF THE CASE.....1

REASONS FOR GRANTING THE WRIT.....6

I. Any camera powerful enough to allow the government to take a picture right inside our bedrooms or bathrooms without search warrants instinctively crosses the line into Fourth Amendment violations and causes fear in the hearts of the people.

II. This Court has already ruled in *Dow Chemical Co. v United States* 476 U.S. 227 (1986) that: "Warrantless aerial photography of a private commercial enclave, using a sophisticated camera capable of recording

TABLE OF CONTENTS - Continued

a great deal more than the human eye ever could see, violates legitimate privacy interests and is unlawful under the Fourth Amendment."

III. The Executive branch of government is not empowered to conduct searches of private dwellings without first gaining the approval of a judge, as set forth by the United States Supreme Court in both *Katz v U.S.*, 389 US 347 (1967) and *United States v United States District Court*, 407 U.S. 297 (1972).

IV. If the Court doesn't use this opportunity to expose this camera and save the public "face" of the government by shifting blame for it existence and use to the defendant, the Republic will suffer irreparable harm.

V. If the Court does not use this opportunity to draw the line on limits of the use of powerful technology by the state, we will all come to live in the world predicted by George Orwell in 1984.

CONCLUSION.....11

APPENDIX.....App. 1

TABLE OF AUTHORITIES

Cases	Page
Clinton v Jones 520 US 681 (1997)	12
Dow Chemical Co. v United States 476 U.S. 227 (1986)	iii,7
Katz v U.S. 389 US 347 (1967)	iv,7
Kyllo v. U.S. 99-8508 (Feb. 2001 oral argument)	i, 7
Nixon v Fitzgerald 457 US 731 (1982)	i, 12
United States v United States District Court 407 U.S. 297 (1972)	iv,8

CONSTITUTION

Fourth Amendment	1,4,6,7,8,9,11,12

STATUTES

28 U.S.C. § 1291	1
28 U.S.C. § 1331	1,2,6
28 U.S.C. § 1332	1,2,6
28 U.S.C. § 2101 (e)	1,2

MISCELLANEOUS

Denver Post	ii,3,6,9
Forbes Magazine	i
1984 by George Orwell	iv,10

OPINIONS BELOW

There are no official or unofficial citations of either District or 10th Circuit Court rulings or opinions in this matter.

JURISDICTION

This case seeks review before judgment in the Appeals Court of a District Court final decision from February 5th, 2001 (Docket Number 00-WM-581), granting the defendant immunity from suit for civil rights violations under 28 U.S.C. § 1331 and 1332. A Notice of Appeal of the District Court action was filed in a timely manner on March 1st, 2001 under 28 U.S.C. § 1291 and is docketed in the 10th Circuit Court of Appeals under 01-1101. The Supreme Court is empowered to hear this case before judgment in the Appeals Court under 28 U.S.C. § 2101 (e) and its own Rule 11.

CONSTITUTIONAL PROVISIONS

Amendment 4: The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, ...shall not be violated...

UNITED STATES CODE INVOLVED

28 U.S.C. § 1291 Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of

appeals from all final decisions of the district courts of the United States.

28 U.S.C. § 1331 Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1332 Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

28 U.S.C. § 2101 (e) Supreme Court; time for appeal or certiorari; docketing; stay

An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

STATEMENT OF THE CASE

Our Republic is in crisis because technology has outstripped the traditional restraints of the Constitution and the natural limits of the human body to gather and process information. When science fiction sounding machines like

Advanced Synthetic Aperture Radar combine with the lust for power, the result is abuse of our most precious right, the right to be free from the prying eyes of the government.

The facts that those abuses occurred is not in dispute as they are safely locked in the public record of the Denver Post where they cannot be tampered with or denied:

> "The Air Force has flown 185 sorties searching for the plane, even using the U-2 spy plane to hunt for the wreckage. Friday's U-2 flight included a building penetrating radar called Advanced Synthetic Aperture Radar, just in case the plane is hidden inside an airport hanger, Romer said." Page 1, Denver Post April 12, 1997. (Romer is former Colorado governor Roy Romer)
>
> "Meanwhile, 3 U-2 spy planes using radar systems that can penetrate buildings, scanned the Southwest from an altitude of 60,000 feet." Denver Post April 13th, pg. 18A.
>
> "Sunday, [General] Campbell relied on radar from U-2 spy planes that can penetrate buildings." Denver Post April 14th, pg. 14A.
>
> "Both the U-2 and SR-71 (spy planes) are using sophisticated reconnaissance equipment including synthetic aperture radar." Denver Post April 15th, 12A.
>
> "The Air Force reported it had a technology that can 'see' into buildings." Denver Post April 17th, pg. 1A.

What they never once mention is getting a single search warrant to do any of that. While the Founding Fathers could never have imagined machines that could peep right through our roofs in secret, they certainly knew enough about human nature to build legal safeguards against such conduct. They gave us the Fourth Amendment as a shield to protect us from just such behavior.

At its core, this case is about deciding if that shield is still valid and still powerful enough to defeat the twin enemies of privacy in the 21st Century: advanced technology and men willing to use it outside the law against the very citizens who funded its development. The defendant argues that because of his lofty position, he is not bound by that law and is therefore not required to contact a judge and get search warrants to do what he did, making him immune from civil suit for his misconduct. I say that because he was acting outside the boundaries of his office, he's not immune from suit.

There are three reasons it is of imperative public importance that this case be heard before the Appeals Court rules. First, it is possible that this technology has been used against the American people since the public acknowledgements of the events of 1997. Although it is impossible to know if that has happened because this camera leaves no trace of its violations the way say, soldiers kicking in a door with rifle butts would, the corrosive effects of unchecked power will eventually lead either a president or the military to use this machine against their political opponents. Because this scenario could have already occurred or might in the future, this Court should move now to expose the events of this case in order to preclude any further such abuses, lest the slow deliberations of the Appeals Court inadvertently allow such ugly conduct to reoccur.

The second reason this case should be heard immediately is because the Superman camera and its secret use against the taxpayers will severely erode our trust in the government. But because it is *Bill Clinton* who authorized its use against us, blame for this breach of faith can be shifted to him, thereby minimizing the massive damage of this betrayal to our sense of security in our homes. I come forward not out of anger towards the defendant but out of sadness for having my faith in Mr. Clinton betrayed after voting for him twice. But by striking while the defendant's other betrayals of our trust are still fresh in the public mind, the damage to the institution of the state will be held to a minimum. If the normal course of appellate procedure is followed, this particular issue may not reach the Supreme Court for years and the willingness to scapegoat Mr. Clinton for these violations may cool to the point where a Court composed of different members may decide to bury the issue of this technology entirely. That is exactly what the defendant is hoping happens.

Lastly, this case is of imperative public importance and should be heard immediately because the loss of faith and trust in our government for having secretly invaded our most private spaces will be enormous, even if most of the wrath of it can be deflected onto the respondent. This Court, though, is the only institution that has the moral stature to not only minimize the coming damage to the state, but to also begin to rebuild the trust of the citizens in the institutions of government. The Appeals Court simply doesn't carry the weight and respect to do that, but the Supreme Court does. I am turning to this Court now because although my faith, and that of many others, in the impartiality of justice in America was seriously shaken by the events of the recent presidential election, those wounds can be healed if the justices act now

to impartially protect the Fourth Amendment.

I'm afraid of what they did with that camera. I'm afraid it may have happened since and believes that unless this technology and the defendant's conduct are exposed, it *will* happen again. I am afraid of my own government and went to the district court in the first instance for protection as Congress authorized me to do under both 28 U.S.C. § 1331 and 1332. I come now to the Supreme Court for help and aid. Please don't turn me away.

REASON FOR GRANTING THIS WRIT

The first reason to grant this writ is that I'm not the only one who is afraid. It is instinctive to fear a government with a camera powerful enough to "see" through our roofs and disrespectful enough of our right to privacy and the Fourth Amendment to use such a disgusting tool in secret and outside the bounds of the law. Others feel the same way.

> "Not quite understanding a report in the Denver Post, an Eagle County woman telephoned the sheriff on Monday asking for a more through explanation. She said she was concerned about the Air Force watching her take a shower in her home." Denver Post, April 17th, 1997, pg. 6A.

That lady didn't misunderstand anything. She believed what her own government was telling her about the power of that camera and she was afraid. She instinctively knew in her heart that technology had outgrown the protections of both the roof and the law. This case asks that those protections be

returned to us, so as to diminish our fear. Only this Court can do that.

The second reason this Court should grant the writ is that it has already ruled in *Dow Chemical Co. v United States* 476 U.S. 227 (1986) that: "Warrantless aerial photography of a private commercial enclave, using a sophisticated camera capable of recording a great deal more than the human eye ever could see, violates legitimate privacy interests and is unlawful under the Fourth Amendment."

The standard of review the Court set fourth in *Dow Chemical* in determining if technology crosses the line into illegality is if the government uses a "sophisticated camera, capable of seeing a great deal *more* that the human eye ever could." While the location of that line may be unclear in the recent case of *Kyllo v. U.S.* (99-8508) because that camera picked up only heat naturally flowing out from a home, *Penk v. Clinton* addresses a technology that deliberately sends an energy pulse into a house before returning an image. Because the human eye could never "see" through a wall the way the Superman camera can, under the standards of *Dow*, it should be considered as having crossed a Fourth Amendment line into unacceptable government conduct absent a warrant and is therefore, appropriate for judicial review.

The third reason to hear this case is that the executive branch of government is not empowered to conduct searches of private dwellings without first gaining the approval of a judge, as first set forth by the United States Supreme Court in *Katz v U.S.*, 389 US 731 (1967):

> "The Fourth Amendment does not contemplate the Executive officers of government as neutral and

> disinterested magistrates. They shouldn't be the sole judges of when to utilize the constitutionally sensitive means of pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to overlook potential invasions of privacy."

The High Court reaffirmed that ruling in *United States v United States District Court*, 407 U.S. 297 (1972).

> "Inherent in the concept of a warrant is its issuance by a neutral and detached magistrate."

The fourth reason to hear this case now is that the mere existence of this camera is going to cause a scandal. When the taxpayers learn that it has already been turned against them in secret, the government will lose "face" among the people. When the truth of these events comes out, the credibility and trustworthiness we have all placed in our federal government will be diminished and lowered. This must be avoided at all costs. The fact that it's *Bill Clinton* being asked to explain his conduct provides a "face"-saving way out for our nation.

That's because we already know the content of the character of this man. Even those of us who voted for him already understand full well what he is capable of and won't be surprised or shocked to learn that he has disrespected the limits of both the law and simple decency by authorizing use of this ugly machine. If the use of this camera without search warrants by the government can be placed on *his* watch and *his* shoulders, the "face" of the United States, our government, is spared humiliation and shame. The Air Force has already tied him directly to this mess:

"Lt. Col Robin Chandler, an Air Forces spokeswoman, briefs the Whitehouse daily." Denver Post, April 16th, 1997, pg. 6A

But just by hearing this case, the Court is also sending the message that although it is willing to shift blame away from the public "face" of our nation, for the greater good, at the same time it will be signaling that there are limits to the proper use of technology by that government. Shifting the burden of these violations to William Jefferson Clinton not only spares the state humiliation, it publicly punishes him at a level appropriate to his misbehavior so that others will think twice before engaging in similar conduct. Exposing his authorization of use of this camera will forever entomb him down through the ages as being a high-tech peeping tom. Tagging him with that historical legacy will stand as a warning marker to others about what the Fourth Amendment prohibits. Without some sort of public rebuke for the use of that camera, these sorts of violations by the state will continue and become more common as the power of technology grows. Without making an example of Bill Clinton now, no one will ever voluntarily go back to respecting our privacy and that's just a fact.

The truth is that the Superman camera is Constitutionally toxic. The Founders not only could never have imagined such a device, they could never have imagined it being used against our homes without search warrants. If Bill Clinton is made to answer for the toxicity of that camera, the damage done to the trust we all place in our government will be kept to a minimum while at the same time preventing further violations of the same nature. That's because like political napalm, the news of that camera will deeply damage whomever it touches. If that fallout can be isolated to our

illustrious former president from Arkansas, it must be handled that way, solely for the good of the Republic. The current administration must **not** become involved in this dispute or defend the use of the camera because that would rupture the damage containment system this case is designed to be. That rupture would result in a loss of trust in the government as an institution while staining the elected officials currently in it because they would then have to explain not only why they are defending the use of that disgusting camera against the American people, but also why they are defending Bill Clinton with our tax dollars.

The last reason to hear this case is that Orwell was mostly right:

> *"The telescreen received and transmitted simultaneously. Any sound Winston made above a very low whisper, would be picked up by it; moreover, so long as he remained within the filed of vision which the metal plaque commanded, he could be seen as well as heard. There was of course no way of knowing whether you were being watched at any given moment...It was even conceivable that they watched everybody all the time...You had to live- did live, from the habit that became instinct- in the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinized."* Nineteen Eighty Four, pg. 4-5

Orwell almost got it all right. He was only off by 13 years in calculating when the government would be spying on us right inside our very homes. He was also off about the dark protecting anyone from the eye of the camera, the eye of the state, because Advanced Synthetic Aperture Radar doesn't need light to function. So even in the darkest corners of our

bedrooms, Big Bother is already watching us and that's a fact. They came right out and told us so.

It must stop or the Constitution will die.

For this is not the world the Framers had envisioned for us, always living in fear from what new and powerful camera the government has pointed at us. We deserve to live free from that fear and the Fourth Amendment is the shield to do that with. Unless this case is heard, that fear will continue along with the abuse that caused it in the first place. Without the protection of our right of privacy by the judges, our experiment in democracy will eventually end. Guaranteed.

CONCLUSION

This case is about directly deciding which is more powerful, technology or the law. It is also about this Court deciding whom it believes more, me or William Jefferson Clinton. Now common sense and a gut instinct should tell us that when the government has machines that can take pictures of us right in the bedroom or the bathroom, those sorts of cameras and their use against us clearly crosses the line into a Fourth Amendment violation.

The defendant, or course, is going to argue that he really isn't bound by the same set of legal restrictions the rest of us must live by. Like the sun gods of old, Mr. Clinton will argue that he moves through the heavens unencumbered by the laws of man. Unfortunately for him, he can't point to any part of the United States federal Constitution to back up that claim. On the other hand, the only thing I can point to in asserting that my civil rights were violated is the Fourth

Amendment. This Court must now decide if the word of a man of William Jefferson Clinton's character and reputation trumps that of the Founding Fathers as expressed in our nation's highest law.

What I'm really asking for is that there be limits to presidential conduct as this very Court set forth in *Clinton v Jones* 520 US 681 (1997) and that those limits be enforced. I humbly ask that this Court at least inquire to see if there is behavior by a president that is beyond the "outer perimeter" of his office, behavior that he can be held accountable for.

The only real way to do that is for the Supreme Court to agree to hear this case, thereby bringing the camera and its use out of the dark and back into the light of the Fourth Amendment. If this doesn't happen, there will be no limits to the power of our highest elected official because every time his actions are challenged, he will automatically hide behind *Nixon v Fitzgerald*, 457 U.S. 731, 766 (1982) and always claim it as immunity from suit. That is the heart of the argument the defendant is presenting here.

He further hopes that because of the fantastic nature of this camera and the ingrained reluctance of anyone to believe it could so easily be turned against us, that the Supreme Court will ignore my pleas for help. He also prays that because I wasn't able to get any lawyer to take my claims of Fourth Amendment violations seriously, this Court won't either.

If that bold thinking works, we'll have created a king because eventually, no matter how large the infraction or serious the crime, the president will always claim immunity under *Nixon*, especially if it's a *pro se* litigant who uncovered the wrongdoing. So because of:

- the serious and power of that Superman camera,
- the level of fear such technology generates,
- the openness and non-deniability with which the military admitted their sins,
- the fact that blame for these Constitutional violations can be shifted to Bill Clinton,
- the High Court citations supporting my position,
- and the fact that *only* the Supreme Court can rebuild the broken trust in the government that is about to be revealed and begin to restore the people's faith in the institutions of the state,

I at least ask for the benefit of the doubt in having this case heard. Otherwise such abuses as described here will continue on in secret and grow worse. This Court will never get a better chance to begin to rebuild its own reputation and bring these wrongs to light in a way least damaging to the Republic while making sure that they never happen again.

This is all the truth.

RESPECTFULLY SUBMITTED

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App. 1

Page PENK

Plaintiff

v.

The Honorable William Jefferson CLINTON

Respondent

United States Court of Appeals,
Tenth Circuit

March 6, 2001

Mr. Page Penk
641 Eldorado Blvd. #812
Broomfield, CO 80021

Re: 01-1101, Penk v. Clinton

Dear Mr. Penk:

This appeal was docketed today.

Enclosed is an Entry of Appearance form. Attorneys for parties must complete and file the form within 10 days from the date of the letter. Pro se parties must complete and file the form within 30 days from the date of this letter. See 10th Cir. R. 46.1. Appellant's failure to enter and appearance may cause the appeal to be dismissed. An appellee who fails to enter and appearance may not receive notice or service of orders. Please contact this office if you have questions.

Patrick Fisher Clerk

App. 2

Page PENK

Plaintiff

v.

The Honorable William Jefferson CLINTON

Respondent

No. 00-WM-581

United States District Court for the District of Colorado

March 1st, 2001

Notice of Appeal.

I, Page Penk, hereby appeal to the U.S. Court of Appeals for the 10th Circuit from the Final Order dismissing this case as entered on February 7th, 2001

App. 3

Page PENK

Plaintiff

v.

The Honorable William Jefferson CLINTON

Respondent

No. 00-WM-581

United States District Court for the District of Colorado

JUDGMENT

On June 27, 2000 Judge Walker D. Miller adopted Magistrate Judge O. Edwards Schlatter's recommendation, granting the defendant's motion to dismiss, filed April 7, 2000. dismissing the complaint with prejudice and awarding costs to the defendant.

Pursuant to and in accordance with the Order entered February 5, 2001, by Judge Walker D. Miller, which is incorporated herein by reference as if fully set forth, it is

ORDERED that the Court's order entered June 27th, 2000 accepting Magistrate Judge Schlatter's recommendation and dismissing this case with prejudice is vacated. It is

FURTHER ORDERED upon *de novo* review of the plaintiff's objections, the recommendation of Magistrate Judge O. Edward Schlatter, filed May 19, 2000 is accepted. It is

FURTHER ORDERED that the defendant's motion to dismiss, filed April 7, 2000 and supplemented on April 18th, 2000 is granted. It is

FURTHER ORDERED that defendant's motion for entry of judgment, filed December 12, 200o is granted. It is

FURTHER ORDERED that complaint and action are dismissed with prejudice. It is

FURTHER ORDERED that judgment is entered in favor of the defendant, the Honorable William Jefferson Clinton and against the plaintiff Page Penk. It is

FURTHER ORDERED that the defendant may have his costs upon the filing of a bill of costs within ten days of the entry of judgment.

DATED at Denver, Colorado, this 7th day of February, 2001.

FOR THE COURT

JAMES MANSPEAKER, CLERK

App. 5

Page PENK

Plaintiff

v.

The Honorable William Jefferson CLINTON

Respondent

No. 00-WM-581

United States District Court for the District of Colorado

ORDER ON MOTION FOR RECONSIDERATION AND OBJECTIONS

MILLER, District Judge

I. INTRODUCTION

This matter is before me on the plaintiff's "Emergency Motion for Review of Dismissal of Case under F.R.C.P. 60 and Leave for Extended Time Under F.R.C.P. Rule 6 to File Response to Magistrate's Recommendation to Dismiss, filed June 30, 2000. Upon review, I conclude that the plaintiff's motion for review should be granted, and the plaintiff's objections should be overruled. Accordingly, this case should be dismissed with prejudice.

II. BACKGROUND

The plaintiff contends that the President violated his constitutional rights by conducting an aerial search of his hanger for a missing military aircraft. In response, the President argues that he is immune from damages that result from the discharge of his duties as Commander in Chief while searching for a missing military aircraft. On May 19, 2000, the magistrate recommend that the complaint be dismissed due to Presidential immunity from damage actions. See Nixon v. Fitzgerald, 457 U.S. 731, 756 (1982) (stating that the President has "absolute immunity from damages liability for acts within the 'outer perimeter' of his official responsibility"). Neither party filed timely objections; therefore, on June 27, 2000, I adopted the magistrate's recommendation dismissing this action. Fed. R. Civ. P. 72(b).

III. DISCUSSION

Pursuant to Fed.R.Civ.P 60(b), the plaintiff contends that he is entitled to relief from my order of dismissal (June 27, 2000) due to a clerical error, excusable neglect, and his status as a *pro se* litigant because he did not receive the magistrate judge's "Fed.R.Civ.P 72 Advisement" with his copy of the recommendation. (Plf.'s Br. at p.1). Rule 72 provides that a party has ten days in which to file specific, written objections to the magistrate's proposed findings and recommendations. Fed.R.Civ.P. 72(b). The failure to file specific objections constitute a waiver of *de novo* review by the district court and a firm waiver of appellate review by the Tenth Circuit.

Theede v. United States, 172 F.3d 1262, 1265-66 (10th Cir. 1999); *United States v. Currier*, 211 F.2d 1279 (10th Cir. 2000) (unpublished).

However, the waiver rule need not be applied as a procedural bar "when the interests of justice so dictate." *United States v. Stanberry*, 129 F.3d131 (10th Cir. 1997) (unpublished). In addition, the Tenth Circuit requires magistrates to afford special protections to pro se litigants. *Id.* Thus, the firm waiver rule does not apply to pro se litigants if the magistrate's recommendation fails to explain the procedural rule (i.e., the ten-day limitation to file objections) and its consequences (i.e., that failure to file objections within ten days will preclude de novo review and appellate review) in the text of the recommendation. *Theede v. United States*, 172 F.3d 1262, 1265-66 (10th Cir. 1999); Moore v United States, 950 F.2d 656, 658-59 (10th Cir. 1991).

In this case, the recommendations states: "The parties rights to seek review or reconsideration of this recommendations , by filing objections within ten days, are attached hereto, and are entitled 'Advisement Under Fed.R.Civ.P. 72.'" (Rec., May 19, 2000, at ¶ 1). The court copy includes the advisement as to the procedural rule and its consequences. (Rec., May 19, 2000). Nevertheless, for whatever reason, the plaintiff did not receive this advisement.

Based on this observation, I conclude the plaintiff's motion for review should be granted. The Tenths Circuit "recognize[s] that Rule 60(b) provides courts with a 'grand reserve of equitable power to do justice in a particular case.' A district court accordingly has substantial discretion to grant relief as justice requires under Rule 60(b). Nevertheless, such relief is extraordinary and may be granted in exceptional

circumstances." *Federal Deposit Ins. Corp. v. United Pacific Ins. Co.*, 152 F.3d 1266, 1272 (10th Cir. 1998) (internal quotes and citations omitted). Rule 60(b), in part, states:

> On motion and upon such terms as are just, the court may relieve a party or party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) and other reason justifying relief from the operation of the judgment . Fed.R.Civ.P. 60(b).

Pursuant to this rule, the plaintiff is entitled to relief on grounds of a mistake and excusable neglect (Rule 60(b)(1)) and because he was not properly advised (Rule 60(b)(1)(6)). I therefore review this matter *do novo* in light of the plaintiff's specific objections contained in his motion.

In the body of his motion, the plaintiff outlines one specific objection to the recommendation-that the magistrate erred in concluding that the President was acting within the scope of authority and therefore had presidential immunity from damage suits.1

1. Apparently, the plaintiff also objects to the recommendation on the basis that he thought that "the court would thank him for redressing this grievance" and that "his only goal in bringing this case was to start a discussion of the role of this powerful technology in the unregulated hands of the government." (Plf.s Br. At p.2-3) These "objections" are not properly framed as "written. Specific objections" to the magistrates recommendations. Fed.R.Civ.P.72(b).

According to the complaint, however, the plaintiff alleges that the President authorized the U.S. Air Forces to search hangers using synthetic aperture radar for a missing military aircraft. As the magistrate comments, searching for a missing military aircraft is clearly within the outer perimeter of the President's official duties as Commander in Chief. (Rec. at. P. 3). Thus, the President is entitled to absolute immunity against suit for damages based upon the plaintiff's allegation. See Nixon v. Fitzgerald, 457 U.S. 731, 756 (1982) (stating that the President has "absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility). Therefore, upon *de novo* review, I accept the magistrate's recommendation.

IV. CONCLUSION

Accordingly, it is entered:

1. The plaintiff's emergency motion for review and extension of time (filed June 30, 2000) is granted.
2. My previous Order (dated June 27, 2000) accepting the magistrate's recommendation and dismissing this case with prejudice is vacated.
3. The plaintiff's objection (filed June 30, 2000) are accepted for review as timely.

4. Upon de novo review of plaintiff's objections, the recommendation of Magistrate Judge O. Edward Schlatter (filed May 19th, 2000) is accepted.

5. The defendant's motion to dismiss (filed April 7, 2000 and supplemented on April 18th, 2000) is granted.

6. This case shall be dismissed with prejudice.

7. The defendant shall be entitled to his costs.

8. The defendant's motion for entry of judgment, filed December 21, 2000, is granted.

9. The clerk of the court shall enter judgment in favor of the defendant and against the plaintiff.

Dated: February 1, 2001